

**Introduced by Senator Chesbro**

February 18, 2004

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An act to add Division 14 (commencing with Section 23000) to the Welfare and Institutions Code, relating to individuals with disabilities.

LEGISLATIVE COUNSEL'S DIGEST

SB 1365, as introduced, Chesbro. Preventing unnecessary institutionalization.

Existing law establishes programs for the provision of care to eligible individuals with disabilities. Existing law, the federal Americans with Disabilities Act of 1990 (P.L. 101-336), as determined by the United States Supreme Court, in *Olmstead v. L.C.* (1999) 527 U.S. 581, prohibits public agencies from the unnecessary institutionalization of individuals with disabilities, and requires states to provide community-based treatment for persons with mental disabilities when the state's treatment professionals determine that that placement is appropriate, the affected persons do not oppose the treatment, and the placement can be reasonably accommodated, taking into account the resources available to the state and the needs of others with mental disabilities.

This bill would require the California Health and Human Services Agency to establish the Olmstead Advisory Council, to provide advice and recommendations for the placement of individuals in noninstitutional settings and for the review of actions and legislation within the scope of the Olmstead requirements.

This bill would require the California Health and Human Services Agency, the State Department of Health Services, and other state departments, as appropriate, to explore, and report to the Legislature on, options for expanding or modifying the state Medicaid plan or Medicaid

waivers and for the modification of statutory law and regulations in order to address barriers to persons moving from, or avoiding placement in, institutional facilities.

This bill would require the appropriate policy committees of the Legislature to hold annual hearings on recommendations from the Olmstead Advisory Council, review the status of the Olmstead Plan implementation and proposed revisions, and to take public comment.

This bill would require the agency and the council to consider input from the appropriate committees of the Legislature and public comments prior to finalizing the annual Olmstead Plan revision.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

*The people of the State of California do enact as follows:*

1 SECTION 1. (a) The Legislature finds and declares all of the  
2 following:

3 (1) In enacting the Americans with Disabilities Act (ADA; 42  
4 U.S.C. 12101 et seq.) Congress found that “historically, society  
5 has tended to isolate and segregate individuals with disabilities,  
6 and despite some improvements, such forms of discrimination  
7 against individuals with disabilities continue to be a serious and  
8 pervasive social problem.”

9 (2) The ADA further states, “the Nation’s proper goals  
10 regarding individuals with disabilities are to assure equality of  
11 opportunity, full participation, independent living, and economic  
12 self-sufficiency for such individuals” and “the continuing  
13 existence of unfair and unnecessary discrimination and prejudice  
14 denies people with disabilities the opportunity to compete on an  
15 equal basis and to pursue those opportunities for which our free  
16 society is justifiably famous, and costs the United States billions  
17 of dollars in unnecessary expenses resulting from dependency and  
18 non-productivity.”

19 (3) In *Olmstead v. L. C.* (1999) 527 U.S. 581, the United States  
20 Supreme Court held that “unjustified institutional isolation of  
21 persons with disabilities is a form of discrimination” under the  
22 ADA. In so holding, the Court noted that “institutional placement  
23 of persons who can handle and benefit from community settings  
24 perpetuates unwarranted assumptions that persons so isolated are  
25 incapable or unworthy of participating in community life” and



1 that “confinement in an institution severely diminishes the  
2 everyday life activities of individuals, including family relations,  
3 social contacts, work options, economic independence, and  
4 cultural enrichment.”

5 (4) In its ruling in *Olmstead*, the Supreme Court gave the states  
6 general guidance on how they might demonstrate compliance with  
7 the ADA. Specifically, the Court advised, a state could establish  
8 compliance with the ADA’s integration mandate if it were to  
9 demonstrate that it had “a comprehensive, effectively working  
10 plan for placing qualified persons with disabilities in less  
11 restrictive settings, and a waiting list that moved at a reasonable  
12 pace not controlled by the State’s desire to keep its institutions  
13 fully populated.”

14 (5) Following the *Olmstead* ruling, in January 2000 the United  
15 States Department of Health and Human Services issued a letter  
16 to the states noting that “no one should have to live in an institution  
17 or a nursing home if they can live in the community with the right  
18 support. Our goal is to integrate people with disabilities into the  
19 social mainstream, promote equality of opportunity and maximize  
20 individual choice.” The letter recommended that states develop  
21 comprehensive, effectively working plans, as described in the  
22 *Olmstead* opinion, with the active involvement of people with  
23 disabilities and their representatives in design, development, and  
24 implementation.

25 (6) In February 2001, President George W. Bush announced the  
26 New Freedom Initiative, recognizing that, “though progress has  
27 been made in the last decade, too many Americans with disabilities  
28 remain trapped in bureaucracies of dependence, denied the tools  
29 they need to fully access their communities.” The intent of the  
30 New Freedom Initiative includes promoting increased access into  
31 daily community life including through “swift implementation of  
32 the *Olmstead* decision.”

33 (7) Assembly Bill 442 (Ch. 1161, Stats. 2002) directed the  
34 California Health and Human Services Agency to develop and  
35 submit to the Legislature by April 1, 2003, a comprehensive plan  
36 identifying the actions the state could take to improve its long-term  
37 care system and develop an array of community-based programs  
38 and services that would enable people with disabilities to avoid  
39 unnecessary institutionalization and receive the services they need  
40 in the most integrated setting appropriate. The plan was to embody

1 the principles articulated by the federal Centers for Medicare and  
2 Medicaid Services for development of an “Olmstead Plan.”

3 (8) In May 2003, the California Health and Human Services  
4 Agency published the California Olmstead Plan affirming that:  
5 “The state commits to providing services to people with  
6 disabilities in the most integrated setting. The state commits to  
7 adopting and adhering to policies and practices that will provide  
8 a full array of services and programs that make it possible for  
9 persons with disabilities to remain in their communities and avoid  
10 unnecessary institutionalization. This commitment involves  
11 making changes in current state policies and will require changes  
12 in federal policies that are biased towards institutionalization.”  
13 The plan lays out strategies for collecting data, providing  
14 comprehensive service coordination, and reviewing community  
15 service capacity necessary to implement the Olmstead decision.

16 (9) Quality community-based care and services for people with  
17 even severe disabilities typically are more cost-effective than  
18 institutional care. Moreover, community-based services result in  
19 a higher quality of life and promote the values of community  
20 participation, inclusiveness, and respect for diversity. With  
21 appropriate supports in the community, people with disabilities  
22 and seniors are able to live more independent and productive lives  
23 as contributing members of society and many people can work and  
24 become taxpayers.

25 (b) It is the intent of the Legislature that there be a partnership  
26 among state government, persons with disabilities, and other  
27 system stakeholders to implement and annually update a  
28 comprehensive, effective Olmstead Plan designed to shift the  
29 long-term care system in California towards community services  
30 and supports and end unnecessary institutionalization.

31 SEC. 2. Division 14 (commencing with Section 23000) is  
32 added to the Welfare and Institutions Code, to read:

33  
34 DIVISION 14. OLMSTEAD ADVISORY COUNCIL

35  
36 CHAPTER 1. GENERAL

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38 23000. The definitions contained in this chapter shall govern  
39 the construction of this division, unless the context requires  
40 otherwise.

1 23002. “Agency” means the California Health and Human  
2 Services Agency.

3 23004. “Council” means the Olmstead Advisory Council.

4 23006. “Department” means the State Department of Health  
5 Services.

6  
7 CHAPTER 2. OLMSTEAD ADVISORY COUNCIL  
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9 23020. The agency shall establish the Olmstead Advisory  
10 Council.

11 23022. (a) The membership of the council shall include the  
12 persons with disabilities and seniors, including individuals who  
13 are currently residing in institutions, advocates for persons with  
14 disabilities and seniors, including family members, and  
15 representatives of long-term care providers and city and county  
16 governments.

17 (b) Each category of members shall include representation of  
18 the range of disabilities, including psychiatric, developmental,  
19 sensory, cognitive, and physical.

20 23024. The membership of the council shall represent the  
21 diversity of California in respect to ethnicity, culture, and language  
22 as well as geography (such as urban and rural, north, central, and  
23 southern California).

24 23026. The council shall advise the agency, other appropriate  
25 state departments, and the Legislature on recommended actions to  
26 improve its long-term care system so that Californians have  
27 available an array of community care options that may allow them  
28 to avoid unnecessary institutionalization.

29 23028. The duties of the council shall include, but not be  
30 limited to:

31 (a) Advising on any proposed legislation or budget proposal  
32 that would either adversely impact or enhance the state’s ability to  
33 comply with the Olmstead decision.

34 (b) Assisting with and reviewing implementation of the  
35 Olmstead Plan and annually recommending updates to the plan,  
36 including, but not limited to, the following:

37 (1) Reviewing for consistency with the principles and  
38 parameters in the Olmstead Plan, all currently existing and  
39 proposed new assessment procedures for individuals residing in  
40 institutions or at risk of placement in institutions, and

1 recommending priorities and timelines for improving assessment  
2 processes.

3 (2) Determining whether those individuals in institutions who  
4 have already been assessed as being appropriate for community  
5 living, or who have expressed a preference for community living,  
6 are moving to more integrated settings at a reasonable pace.

7 (3) Assisting in analysis of current wait lists and identifying  
8 efforts that would be needed to ensure wait lists move at a  
9 reasonable pace.

10 (4) Developing a strategy for diverting individuals from initial  
11 placement in skilled nursing facilities and other institutions  
12 including, but not limited to, creation of a model assessment  
13 process, identification of alternative community services, and  
14 recommending a timeline for implementing the strategy statewide.

15 (5) Identifying additional strategies and prioritizing the steps  
16 necessary to identify all Californians who could be served  
17 successfully in noninstitutional settings and to address the barriers  
18 to these individuals moving at a reasonable pace from, or avoiding  
19 admittance to, institutional long-term care facilities.

20 (6) Recommending revisions to the plan and timelines for  
21 implementing components of the updated plan.

22 (c) Advising the agency and state departments on regulations  
23 and licensing requirements that are inconsistent with, and impede  
24 the implementation of, the Olmstead Plan.

25 (d) Participating in drafting informational materials and  
26 developing alternative strategies for providing meaningful  
27 information about alternatives to institutional long-term care,  
28 including, but not limited to, basic information about all state or  
29 locally funded community services, current home- and  
30 community-based waivers, and local nongovernmental resources  
31 available to supplement governmental programs and to support  
32 individuals who would otherwise require long-term institutional  
33 care.

### 34 CHAPTER 3. WAIVER REPORTS

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37 23040. The department shall report to the agency, the  
38 Legislature, and the Olmstead Advisory Council and post on  
39 relevant departmental and long-term community care Web sites  
40 basic information about all current home- and community-based

1 waivers and about any proposed new waiver and about any request  
2 to amend or renew a current waiver.

3  
4 CHAPTER 4. HEARINGS  
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6 23050. (a) The appropriate policy committees of the  
7 Assembly and Senate shall annually conduct public hearings to  
8 hear recommendations from the Olmstead Advisory Council,  
9 review with the agency the status of Olmstead Plan  
10 implementation and proposed revision, and take public comment.

11 (b) Prior to the hearing, the agency shall forward to the  
12 committees, and make publicly available, a copy of the Olmstead  
13 Plan with an indication of the activities completed or undertaken  
14 in the past year and the proposed revisions for the following year  
15 delineated as well as a description of other activities undertaken  
16 pursuant to this division. The chairs of the legislative committees  
17 may request additional information prior to the hearings.

18 23052. The agency and counsel shall consider the input of the  
19 Legislature and public comments prior to finalizing the annual  
20 plan revision.

21 23054. At the discretion of the respective chairs, the  
22 committees may hold a joint hearing to satisfy the requirements of  
23 this chapter.

24 SEC. 3. The California Health and Human Services Agency,  
25 the State Department of Health Services, and other state  
26 departments as appropriate, shall explore, and report to the  
27 Legislature on, options for expanding or modifying the state  
28 Medicaid plan or Medicaid waivers and for modifying state laws  
29 or regulations in order to address barriers to persons moving from,  
30 or avoiding placement in, institutional facilities, including, but not  
31 limited to:

32 (a) Earmarking home- and community-based waiver slots  
33 which include transition and habilitation services for persons  
34 moving to the community from Medi-Cal funded long-term care.

35 (b) Expanding home- and community-based waiver slots  
36 sufficiently so that all individuals at risk will be assessed for and  
37 offered community services before being placed in an institutional  
38 setting.

39 (c) Authorizing regional centers to become pass-through  
40 providers of home nursing to the same extent counties may be



1 pass-through providers or fiscal intermediaries pursuant to  
2 Section 14027 of the Welfare and Institutions Code, in order to  
3 reduce the significant problems faced by regional center clients in  
4 accessing Medi-Cal authorized home nursing services. A regional  
5 center not electing to do so, would nonetheless be responsible for  
6 ensuring that their Medi-Cal clients have access to the home  
7 nursing services authorized by the Medi-Cal program.

8 (d) Permitting long-term care residents who have been in  
9 Medi-Cal funded long-term care facilities for more than three  
10 months and who qualify for Medi-Cal with a share of cost, to have  
11 their share of cost determined by community standards (for  
12 example, an amount over six hundred dollars (\$600) versus an  
13 amount over thirty-five dollars (\$35)) for not only the month in  
14 which they are discharged to the community but also for two prior  
15 months so that these individuals will have the means to pay for the  
16 extra costs required to return to the community.

17 (e) Address the problem of custody relinquishment and  
18 unnecessary out-of-home placement of children with mental  
19 health conditions, by providing funding for the analysis authorized  
20 by Senate Bill 1911 (Ch. 887, Stats. 2002) and, as provided by  
21 Senate Bill 1911, submitting an application for and implementing  
22 a Medicaid home- and community-based waiver or Katie Beckett  
23 option to serve children and youth with mental health service  
24 needs.

25 (f) Extending the discharge planning obligations of an acute  
26 care hospital with respect to Medi-Cal recipients who are  
27 discharged or transferred to what is expected to be a short-term  
28 nursing facility stay so that those patients are entitled to continued  
29 assistance from the hospital discharge planner in addition to  
30 assistance from the nursing facility.

31 (g) Provide that the onsite Medi-Cal consultants at acute care  
32 hospitals including acute rehabilitation facilities have the  
33 authority to do any of the following:

34 (1) Approve a discharge treatment authorization request (TAR)  
35 for individuals discharged or transferred for a short nursing facility  
36 stay.

37 (2) Enroll acute care residents into home- and  
38 community-based facilities to divert them from nursing facility  
39 placement.





1 (h) Amending the state plan to add targeted case management  
2 and other services (such as an occupational therapy home  
3 assessment) for individuals in Medi-Cal funded long-term care to  
4 assist them in moving to the community when there are significant  
5 barriers to timely discharge and once out, to assist them in  
6 remaining in the community.

7 (i) Amending the nursing facility home- and community-based  
8 waivers with individual cost-effectiveness formulas by doing the  
9 following:

10 (1) Excluding from the cost-effectiveness formula costs that  
11 would be incurred regardless of whether the individual were in the  
12 community or a nursing facility (i.e., medications and custom  
13 wheelchairs).

14 (2) Providing that for individuals discharged from a long-term  
15 care facility into a home- and community-based facility, they may  
16 elect to have their former facility costs be their individual  
17 cost-effectiveness measure.

18 (j) Amending the two nursing facility waivers administered by  
19 the State Department of Health Services and the acute care waiver  
20 (In-Home Medical Care Services Waiver) also administered by the  
21 State Department of Health Services as well as the Multipurpose  
22 Senior Services Program (MSSP) waiver to include one-time  
23 community transition services for those leaving institutional care  
24 and to include habilitation services.

25 (k) Amending the state Medicaid plan with respect to services  
26 provided by intermediate care facilities/developmentally disabled  
27 (ICF/DD), intermediate care facilities/developmentally disabled  
28 habilitative (ICF/DH), and intermediate care  
29 facilities/developmentally disabled—nursing (ICF/DN) to  
30 include payment for adult day health or other day programs for  
31 those residents who would benefit from those services which  
32 would provide federal reimbursements for these now state-only  
33 funded services.

34 (l) Amending the home- and community-based waiver for  
35 persons with developmental disabilities by adding additional  
36 services such as voucherred respite, specialized therapeutic  
37 services, and others that currently are funded with solely state  
38 funds but which would be entitled to federal reimbursement if  
39 added to the menu of services under the waiver.

1 (m) Adding additional slots so that all regional center clients  
2 who would qualify for services in one of the categories of ICF/DD  
3 facilities could be included in the waiver.

4 (n) Amend the eligibility requirements for care in one of the  
5 categories of ICF/DD to bring them in line with the eligibility  
6 requirements of these facilities in other states so that the number  
7 of regional center clients who could be served under the DD  
8 waiver could be increased.

9 (o) Expediting the processing of the self-determination waiver  
10 for persons with developmental disabilities and maximizing the  
11 number of individuals who can be served under the waiver.

12 (p) Expanding the waiver for ICF-DD/CN (Intermediate  
13 Care-Developmentally Disabled Continuous Care Nursing)  
14 homes so that individuals with nursing needs now in institutions  
15 will have additional community options.

